UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

SIENNA GROUP, L.L.C. AND MEADCO, L.L.C.
d/b/a SUMMERFIELD[1]

Employer

and CASE 7-RD-3419

MICHELLE FOSTER, An Individual

Petitioner

and

UNITED STEELWORKERS OF
AMERICA, AFL-CIO, CLC[2]

Union

APPEARANCES:

Matt Kappers, of Berkley, Michigan, for the Employer.
Michelle Foster, of Livonia, Michigan, pro se.
Richard Dietrich, of Taylor, Michigan, for the Union.

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding[3], the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and hereby affirmed.

[1] The name of the Employer appears as amended at the hearing. The Employer stipulated that it operates as a joint or single employer.
[2] The name of the Union appears as amended at the hearing.
[3] The Employer and the Union filed briefs, which were carefully considered.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks a decertification election in a unit of 14 full-time and regular part-time clerical employees employed by the Employer at its sites (cemeteries) located at 11851 Van Dyke, Detroit, Michigan (Forestlawn Cemetery); 38425 Garfield Road, Clinton Township, Michigan (Cadillac East Cemetery); 34224 Ford Road, Westland, Michigan (Cadillac West Cemetery); 43300 West 12 Mile Road, Novi, Michigan (Oakland Hills Cemetery); 17840 Middlebelt Road, Livonia, Michigan (Mt. Hope Memorial Gardens); 23501 Grand River Avenue, Detroit, Michigan (Grandlawn Cemetery); and 19975 Woodward, Detroit, Michigan (Woodlawn Cemetery); but excluding office managers, managers, salespersons, confidential employees, and guards and supervisors as defined in the Act. The Union maintains that there is both a recognition bar and contract bar to the holding of an election, and that the petition should be dismissed. The Employer asserts that there is no recognition bar and no executed contract in effect to bar an election. For the reasons set forth below, I find that there is no contract bar because the contract does not have a fixed expiration date, and ratification was a condition precedent to the effectiveness of the signed tentative agreement and the instant petition was filed prior to ratification. However, I further find that there is a recognition bar to the instant petition. Accordingly, no question concerning expiration exists and I dismiss the petition.

The Evidence

The Employer is engaged in providing cemetery and burial services. It operates 11 cemeteries in southeastern Michigan.

By about August 16, 2002, the Employer and Union executed a recognition agreement covering office clerical employees at the 11 facilities operated by the Employer. This agreement stated, in pertinent part, that "if the [Union] achieves majority status (as verified by a showing of authorization cards, each park to be counted separately) among the above-described unit, the Employer will recognize the [Union] as the exclusive bargaining agent for that park." The parties agreed that the "Recognition Agreement" would remain in effect for a period of one calendar year from the date that either party first signed the agreement.

Subsequently, pursuant to the recognition agreement, the Union presented the Employer with a majority showing at 7 of the Employer's 11 facilities. On about November 13, 2002, the Employer and Union executed a "Card Count Recognition Agreement," wherein the Employer recognized the Union as the exclusive bargaining representative for the office clerical employees at the seven facilities described earlier. The remaining four facilities operated by the Employer were not included, as the Union did not present a majority showing of interest for those locations.

After the Employer's official recognition of the Union, the Employer and Union scheduled contract negotiation sessions. Several meetings were held throughout the following 11 months. An additional five to seven scheduled meetings were canceled. However, the Union did not believe that the cancellations were in bad faith, or consider the Employer to have bargained in bad faith. The Union further asserted that negotiations went fairly well. Eventually, a tentative contract agreement was reached in early October 2003.[4] Specifically, the Employer, by its agent Matt Kappers, signed the tentative agreement on October 8, and the Union, by its representative Linda Lucas, signed it on October 9. In negotiations, the parties worked from an existing collective bargaining agreement between the parties covering ground employees at the Employer's Woodlawn Cemetery facility (Woodlawn Agreement). A proposed contract was drafted from that agreement. The parties then added and/or modified terms for the clerical employees, including terms involving the grievance procedure, seniority rights, hours of work and pay, working conditions (including managements rights), and other miscellaneous provisions. These additions and modifications were set forth in a Settlement Agreement

The tentative agreement, comprised of the Woodlawn Agreement and Settlement Agreement, constitutes the agreement that the Union relies on as a contract bar. Although the Agreement states that it will be "effective the ____ day of 2003… until ____, 2006…" and the parties agreed that the contract would be three years, the agreement does not contain the actual effective dates of the contract. The Union assumed it would be effective when it was ratified. Further, the Settlement Agreement specifically notes that the tentative agreement was subject to membership ratification.

After the Settlement Agreement was signed, Lucas scheduled a ratification meeting with the bargaining unit for October 15. On that date, Lucas separately went to each of the seven Employer facilities, provided a copy of the tentative agreement to the unit employees in attendance, and explained the provisions of the agreement. Lucas conducted a ratification vote by secret ballot at each location on this same date. The ratification vote tally resulted in 8 "yes" and 5 "no" votes.

On October 14, one day prior to the holding of the ratification vote, the Petitioner filed the instant petition.

[4] Unless otherwise indicated, all dates hereafter are 2003.

Analysis

Contract Bar

The Union first contends that there is a contract bar that prevents the processing of the instant petition. The Board's contract-bar doctrine is intended to balance the statutory policies of stabilizing labor relations and facilitating employees' exercise of free choice in the selection or change of a bargaining representative. ***Direct Press Modern Litho***, 328 NLRB 860 (1999). The doctrine is not imposed by the Act or judicial caselaw, and the Board has considerable discretion to formulate and apply its rules. ***Bob's Big Boy Family Restaurants v. NLRB***, 625 F.2d 850, 853-854 (9th Cir. 1980).

In determining whether there is a valid contract, the Board examines whether the contract is written, contains substantial terms and conditions, and is signed by all parties. ***Appalachian Shale Products Co.***, 121 NLRB 1160 (1958); ***Georgia Purchasing***, 230 NLRB 1174 (1977). The Settlement Agreement was signed by representatives of both the Employer and the Union on October 8 and 9, respectively. The Settlement Agreement is clearly referring to an existing agreement, the Woodlawn Agreement, and notes particular Articles and Sections of that agreement and explains the agreed-upon changes. The Settlement Agreement sets forth agreed-upon changes regarding substantial and important terms and conditions of employment, including changes to the grievance procedure, seniority rights, hours of work and pay, working conditions (including managements rights), and other miscellaneous provisions[5].

However, while the tentative agreement contains many substantial terms and conditions of employment, it is well settled that an expiration date is a required "substantial term" and contracts having no fixed clarification are not a bar for any period. ***Cind-R-Lite Co.,*** 239 NLRB 1255 (1979). Here, the contract does not have a fixed expiration date on its face. Accordingly, the contract cannot serve as a bar to the petition[6].

Further, the Board has long held that, when ratification is a condition precedent to contractual validity, the contract is ineffective unless it is ratified. ***American Broadcasting Co.***, 114 NLRB 7 (1956). It is clear in this case that the parties understood

[5] The Employer contends there was no agreement on health insurance because the language on health insurance in the Woodlawn Agreement and the Settlement Agreement are not the same. However, the Settlement Agreement modified the Woodlawn Agreement as it applied to health insurance. The Settlement Agreement clearly states that "health insurance benefits will be the same as in the Mt. Hope contract", another current contract between the Employer and the Union. Thus, there was agreement on health insurance.

[6] Cf. ***Cooper Tire and Rubber Company.,*** 181 NLRB 509 (1970), where the contract stated that it would be "effective from_____ 1968… until _____1971," and provided for three annual wage increases on September 1, 1968, 1969, and 1970. The Board held that as the contract specifically provided for a duration span of 3 consecutive years (with the day and month omitted) and also set forth the effective day, month, and year of the three annual wage increases, the contract on its face could reasonably be construed as having a 3-year term, effective September 1, 1968.

that the tentative agreement was not valid until it was ratified. The language in the tentative agreement states as much. Further, the witnesses testified at the hearing that they did not consider there to be an agreement until ratification occurred, and due to this fact, had not yet agreed upon the effective dates of the contract. If the bargaining unit had rejected the contract, the parties would have had to go back to the bargaining table for further negotiations.

The agreement was ratified on October 15. The instant petition was filed on October 14, prior to the ratification vote. Thus, for this reason also, the contract was not effective at the time the petition was filed and cannot serve as a bar to the petition.

Recognition Bar

The Union next contends that there is a recognition bar that blocks the instant petition. I find that the August 16, 2002 recognition agreement entered into by the Union and Employer was not a valid or cognizable recognition agreement. Instead, it served as a condition precedent to the Employer's voluntary recognition that later occurred on November 13, 2002, after the Union presented a majority showing for 7 out of 11 of the Employer's facilities. The August agreement specifically states that the Employer would not recognize the Union unless and until the Union presented a majority showing, and actual recognition did not in fact occur until November 13, 2002. Further, the parties did not begin contract negotiations until after November 13, 2002.

As a means of achieving industrial peace, the Board seeks to balance the competing goals of employee free choice while promoting voluntary recognition and protecting the stability of the collective-bargaining relationships. ***Ford Center for the Performing Arts***, 328 NLRB 1 (1999), citing ***Smith's Food & Drug Centers***, 320 NLRB 844, 846 (1996). The Board encourages voluntary recognition and bargaining by requiring that the parties "must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining." ***Keller Plastics Eastern, Inc.,*** 157 NLRB 583, 587 (1966).

The Board has previously held that what constitutes a "reasonable time" is not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions. ***Ford Center for the Performing Arts***, supra, citing **Royal Coach Lines**, 282 NLRB 1037, 1038 (1987). In that case and ***MGM Grand Hotel***, 329 NLRB 464, 466 (1999), the Board held that to determine reasonable time, it will examine the degree of progress made in negotiations, whether or not the parties were at impasse, and whether the parties were negotiating for an initial contract. By this policy, the Board seeks to enable newly established bargaining relationships to become productive and harmonious. ***Id***.

In a recent Board case involving the withdrawal of recognition from an incumbent union, ***Lee Lumber and Building Material Corp***., 334 NLRB 399 (2001), the Board

expanded on the test for determining reasonable time. It held that a reasonable time should be a minimum of six months and should not exceed one year. ***Id***. at 402. In determining whether the six month time should be extended, the Board set forth five factors that it would consider: (1) whether the parties are bargaining for an initial contract, (2) the complexity of the issues and of the bargaining process, (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions, (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse. ***Id***.

An analysis of the factors set forth in ***MGM Grand Hotel*** and ***Lee Lumber*** results in a conclusion that a reasonable amount of time had not passed since the Employer's voluntary recognition to enable the Union to complete its contract negotiations. Here, the parties were bargaining an initial contract. More compelling, the parties had engaged in fruitful negotiations that resulted in a signed, tentative agreement prior to the filing of the decertification petition. Further, there was no impasse.

MGM Grand Hotel is closely on point to the instant matter. In that case, nearly 12 months passed between the Employer's voluntary recognition and the filing of the decertification petition, as opposed to the nearly 11 months that passed in the instant matter. In finding recognition bar, the Board relied heavily on the fact that the parties had "nearly" reached an agreement. There were several issues left to be resolved when the petition was filed. Those issues were resolved within days after the filing of the petition, and a short time later, a ratification vote was held. Here, at the time the instant petition was filed, the parties had reached a complete agreement, and the only issue that remained was ratification. The contract was in fact ratified the day after the petition was filed, by a clear majority vote of 8 to 5[7]. See also, ***Ford Center for the Performing Art,*** supra at 2. ("[t]hat the process took nine months was clearly not unreasonable especially given the difficulties of initial contract bargaining".) The Board has expressed its reluctance to negate good-faith bargaining for an initial contract when the parties efforts are on the verge of reaching finality. ***Id***.

I conclude that the policies of the Act are best served by finding that a reasonable amount of time had not elapsed at the time the petition was filed. During the nearly 11 months following the voluntary recognition on November 13, 2002, to the date of the tentative agreement signed by the parties on October 8 and 9, it is obvious that fruitful negotiations occurred such that the parties were able to reach an agreement on an initial contract. The policy of allowing a reasonable time to bargain an initial contract allows a

[7] In ***MGM Grand Hotel***, the Board also relied on the innovative process used by the parties to negotiate an agreement from the ground up, by creating committees and holding numerous meetings. This was noted as an example of "complex" negotiations, factor 2 in the multi-factor analysis set forth in ***Lee Lumber***. Although in the instant matter, negotiations were not as complex and involved a significantly smaller bargaining unit, the Board in ***Lee Lumber*** found that the factors described for determining "reasonable time" must be considered together, and none is dispositive individually or necessarily entitled to special weight. ***Lee Lumber and Building Material Corp***., supra at 405.

labor organization freely chosen by employees to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and be decertified. ***MGM Grand Hotel***, supra at 466, citing ***Ray Brooks v. NLRB***, 348 U.S. 96 (1954). Accordingly, the instant petition is barred by the Employer's voluntary recognition of the Union on November 13, 2002, and no question of representation exists.

ORDER

IT IS ORDERED that the petition is dismissed.[8]

Dated at Detroit, Michigan, this 25th day of November 2003.

(SEAL)

/s/ Stephen M. Glasser
Stephen M. Glasser, Regional Director
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Classifications

347-2067
347-2067-6700
347-4020-3300
347-4020-3350-5000

[8] Under the provisions of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to **Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by **December 9, 2003**.